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Financial Equality in Marriage and Parenthood: Sharing the Burdens as Well as the Benefits

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FINANCIAL EQUALITY IN MARRIAGE AND PARENTHOOD: SHARING THE BURDENS AS WELL AS THE BENEFITS

Gradual judicial rejection of years of socially accepted sex discrimination has enabled women to increase dramatically their economic independence both within and without the home.[1] Historically, courts have been reluctant to impose financial responsibilities on women. On the premise that women were innately less competent to function independently in the business world, courts excluded women from certain male-dominated professions[2] as well as from specific civic[3] and employment-related[4] obligations borne by men. Judicial reluctance to require women to assume duties formerly performed by men alone has also colored domestic relations law. Traditionally, the burdens of alimony[5] and spousal support[6]

1. A number of classifications based on sex have been declared unconstitutional under the equal protection clause of the fourteenth amendment. U.S. CONST. amend. XIV, § 1, cl. 4. Califano v. Goldfarb, 430 U.S. 199 (1977) (Social Security survivors' benefits for widows only and not widowers regardless of dependency); Craig v. Boren, 429 U.S. 190 (1976) (lower drinking age permitted for women than for men); Stanton v. Stanton, 421 U.S. 7 (1975) (parental support for sons, but not daughters, required until the age of 21); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (Social Security benefits provided to children of surviving female but not male spouse); Frontiero v. Richardson, 411 U.S. 677 (1973) (presumption of dependency of spouses of married men in the military but not of married women); Reed v. Reed, 404 U.S. 71 (1971) (state preference for males over females as estate administrators).

2. *See, e.g.*, Goesaert v. Cleary, 335 U.S. 464 (1948) (tending bar); Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872) (practicing law).

3. *See, e.g.*, Hoyt v. Florida, 368 U.S. 57 (1961) (women exempted from jury service). *But see* Duren v. Missouri, 439 U.S. 357 (1979) (Missouri statute allowing women an automatic exclusion from jury service upon request violates the "fair cross section" requirement of the sixth amendment). *See* Johnston & Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.U.L. REV. 675, 708-21 (1971), for a discussion of the development of the jury service duty for women.

4. *See* Muller v. Oregon, 208 U.S. 412 (1908) (Oregon statute precluding women from working more than 10 hours a day upheld).

5. *See, e.g.*, Stern v. Stern, 165 Conn. 190, 332 A.2d 78 (1973); Jacobs v. Jacobs, 50 So. 2d 169 (Fla. 1951); Hedderick v. Hedderick, 163 Pa. Super. Ct. 564, 63 A.2d 373 (1949). *See also* 2 W. NELSON, ON DIVORCE AND ANNULMENT § 14.06 (2d ed. 1961). Some states, however, have enacted sex-neutral alimony statutes. *See, e.g.*, OHIO REV. CODE ANN. § 3105.18 (Supp. 1978). *See also* Kontner v. Kontner, 103 Ohio App. 310, 139 N.E.2d 366 (1966) (alimony award to husband conditioned on clear showing that he is in need); Rainburg v. Rainburg, 80 Ohio App. 303, 75 N.E.2d 481 (1946) (alimony award to husband permissible if divorce is obtained by husband for his wife's aggression).

6. *See* F. KUCHLER, LAW OF ENGAGEMENT AND MARRIAGE 15 (2d ed. 1978).

after divorce or separation have fallen upon men, alone, while mothers have generally been exempted from the duty of providing financial support for their children[7] during and after marriage.

Assumptions that women function in society primarily as homemakers and mothers underlie many states' alimony and child support statutes. Recent case developments in domestic relations, however, challenge the states' reliance on these assumptions.[8] Under the fourteenth amendment equal protection clause, the Supreme Court has prevented states from depriving one sex of benefits granted the other unless it can demonstrate that the sex differentiation is reasonably related to a legitimate state interest.[9] Most recently, the Supreme Court has applied this equal protection standard to strike down a state statute requiring only men to pay alimony.[10] Simultaneously, lower courts are in the process of reconsidering the traditional allocation of financial responsibility in spousal[11] and child support[12] decrees. This Note will consider cases indicating a movement toward more equitable division of male and female domestic responsibilities to identify legal relationships which may be altered to conform with the emerging principle under the fourteenth amendment of equalizing obligations during and after marriage.

I. Domestic Rights and Responsibilities: An Historical Overview

Courts have traditionally regarded married women as unable to control and manage property.[13] Under the principle of coverture at common

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7. *See, e.g.*, Gomez v. Perez, 409 U.S. 535 (1973); Brock v. Brock, 281 Ala. 525, 205 So. 2d 903 (Ala. 1967); Schneider v. Schneider, 188 Neb. 80, 195 N.W.2d 227 (Neb. 1972). *Contra*, Addy v. Addy, 240 Iowa 255, 36 N.W.2d 352 (1949).

8. *See* notes 67-87 and accompanying text *infra*.

9. The Supreme Court first applied the fourteenth amendment's equal protection standard to strike down sex discrimination in Reed v. Reed, 404 U.S. 71 (1971). In that case, the Court struck down an Idaho statute giving preference to men over women in appointments as administrators of decendents' estates. Following *Reed*, the Court continued to erect constitutional barriers to sex discrimination in a series of challenges to both state and federal legislation. *See, e.g.*, Califano v. Goldfarb, 430 U.S. 199 (1977) (Social Security survivors' benefits allowed regardless of dependency to widows but not to widowers violates fourteenth amendment); Stanton v. Stanton, 421 U.S. 7 (1975) (parental support for sons until the age of 21 but not for daughters violates fourteenth amendment).

10. Orr v. Orr, 440 U.S. 268 (1979).

11. *See* Coleman v. Maryland, 37 Md. App. 322, 377 A.2d 553 (1977). *See also* notes 69-71 and accompanying text *infra*.

12. *See* Plant v. Plant, 20 Ill. App. 3d 5, 312 N.E.2d 847 (1974). *See also* note 106 *infra*.

13. *See* Weitzman, *Legal Regulation of Marriage: Tradition and Change*, 62 CALIF. L. REV. 1169, 1180-87 (1974).

law,[14] women were denied the ability to hold property, and their husbands were given sole control over the family assets. Coverture thus shielded married women from the financial responsibilities of spousal and child support, while it gave men both the benefits and burdens associated with holding property.[15] Courts observed this common law duty of the husband to support his wife during marriage[16] regardless of the wife's previous financial standing or vocational ability.[17] In contrast, courts recognized domestic household functions and care of children as duties uniquely belonging to women.[18] A husband was held responsible for purchases made in fulfillment of his wife's household duties because she could not fulfill these responsibilities without financial support from him.[19]

This judicial characterization of women as financially dependent extended beyond marriage through separation, divorce, and widowhood. Alimony, the allowance a divorced husband is required to make for the support and maintenance of his former wife, derived from the husband's common law obligation of spousal support.[20] Through alimony statutes, states sought to prevent women from becoming public charges once they

14. The term coverture "implies that . . . [the wife] is . . . under the protection of her husband, and the common law will not allow her to do anything which may prejudice her rights or interests, without his advice, consent and approval. In this respect, she is incapable of acting alone." Osborn v. Horine, 19 Ill. 123, 125 (1857). Commentators have often viewed the doctrine of coverture as based on a "fiction that husband and wife had a single identity — that of the husband." Weitzman, *supra* note 13, at 1173.

15. *See* F. KUCHLER, *supra* note 6.

16. *Id.*

17. A husband could not be relieved of the liability to support his wife despite extraordinary circumstances. *See, e.g.*, Churchward v. Churchward, 132 Conn. 72, 42 A.2d 659 (1972) (wife's independent wealth will not relieve husband of his support obligation). *See also* Kershner v. Kershner, 244 App. Div. 34, 278 N.Y.S. 501 (1935), *aff'd*, 269 N.Y. 655, 200 N.E. 43 (1936) (wife's prenuptial agreement to surrender temporary support rights void as against public policy). *See also* Note, *The Economics of Divorce: Alimony and Property Awards*, 43 U. CIN. L. REV. 133 (1974).

18. In King v. King, 246 Miss. 798, 152 So. 2d 889 (1963), for example, the court noted that a husband's support for his wife may be contingent upon discharge of household duties imposed upon her by the marriage contract. Courts often barred women from most occupations on the theory that employment outside of the home might interfere with a woman's duty to maintain the household and care for the children. *See* Weitzman, *supra* note 13, at 1187.

19. *See, e.g.*, Saks & Co. v. Bennett, 12 N.J. Super. 316, 79 A.2d 479 (1951).

20. Alimony is defined in Hedderick v. Hedderick, 163 Pa. Super. Ct. 564, 63 A.2d 373, 375 (1949), as "an extension or prolongation of the legal obligation to support beyond the period of the existence of the marital status."

The conduct of the parties has been an important consideration for divorce courts awarding alimony. Although alimony was a continuation of the husband's duty to support his wife, many jurisdictions precluded her from receiving alimony if the dissolution of the marriage was primarily due to the wife's conduct. This "fault" criteria also worked as a penalty to some exhusbands by requiring men who were at fault to pay high alimony amounts re-

were removed from the protective shelter of their husbands' income.[21]

These considerations also persuaded courts to assign the child support obligation to fathers.[22] Just as wives were free of the burden of paying alimony to financially dependent exhusbands, so mothers were generally relieved of the duty of providing financial support for their children, both during and after marriage.[23] In many jurisdictions, the father had exclusive responsibility for child support,[24] while in others, the mother was liable only in the event of the father's death or incapacity.[25] Courts usually assumed that most mothers could not acquire assets on their own in order to support their children.[26]

In the early 1970's, however, courts began to reconsider states' conferral of alimony and child support benefits solely on the woman. This trend reflected an increased availability of educational and career opportunities for women. The change in court decisions has been slow, however, partly because new opportunities for women have not radically changed the economic inequality between the sexes. Nonetheless, many women are now acquiring assets during marriage and establishing financial independence prior to separation or divorce.[27] This trend has stimulated an increase in the divorce rate,[28] which has in turn resulted in a greater number of women turning to the job market for fulfillment of personal as well as

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gardless of their wives' actual needs. *See* Note, *supra* note 17, at 143. In no case, however, would a "guilty" wife be required to support her exhusband.

21. See Coleman v. Maryland, 37 Md. App. 322, 325, 377 A.2d 553, 555 (1977), for a discussion of the historical origins of alimony.

22. *See* Ruhsam v. Ruhsam, 21 Ariz. App. 101, 515 P.2d 1199, 1202 (1973). *See also* W. BROCKELBANK, INTERSTATE ENFORCEMENT OF FAMILY SUPPORT (1960); F. KUCHLER, LAW OF ENGAGEMENT AND MARRIAGE (2d ed. 1978); Foster, *Dependent Children and the Law*, 18 U. PITT. L. REV. 579 (1957).

23. *See* Ohio v. Oppenheimer, 46 Ohio App. 2d 241, 348 N.E.2d 731, 736 (1975), for a discussion of earlier cases which set forth the traditional view that the father has the primary duty for minor children.

24. *See* Kurtz, *The State Equal Rights Amendments and Their Impact on Domestic Relations Law*, 11 FAM. L.Q. 101, 145 (1977).

25. *Id.*

26. *See* Weitzman, *supra* note 13, at 1181.

27. The percentage of women in the work force has grown from 18% in 1890 to 50% in 1978. Approximately 50% of all married women are now in the labor force. THE SUBTLE REVOLUTION: WOMEN AT WORK 3 (R. Smith ed. 1979).

28. The divorce rate increased from 2.2 per 1,000 population in 1960 to 5.1 per 1,000 in 1978. The actual number of divorces in 1978 (1.1 million) was one-half the number of marriages. U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, SERIES P-23, NO. 84, DIVORCE, CHILD CUSTODY AND CHILD SUPPORT 1 (1979). *See generally* C. BIRD, THE TWO-PAYCHECK MARRIAGE (1979); ABA FAMILY LAW SECTION, ECONOMICS OF DIVORCE, A COLLECTION OF PAPERS (1978) [hereinafter cited as ECONOMICS OF DIVORCE]; U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. NO. 1880, U.S. WORKING WOMEN (1975).

Recent studies indicate that, with every $1,000 increase in her salary, a woman's chances of divorce increase by two percent. *See* C. BIRD, *supra* at 28. The increase in divorce rates

financial objectives. These social and economic changes should be considered by courts in confronting domestic relations issues.

A. Constitutional Precursors to Domestic Independence for Women

The United States Supreme Court recognized the growing independence of women and their changing role in society[29] when women began raising gender discrimination claims under the equal protection clause of the fourteenth amendment.[30] Unlike race discrimination,[31] discrimination against women did not receive vigorous judicial analysis under the fourteenth amendment until 1971. Formerly, a state could grant benefits or confer obligations on one sex but not the other if the classification was rationally related to some legitimate state interest.[32] Under this scheme, gender classifications were invariably upheld.[33] In *Reed v. Reed*,[34] however, the

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is also partly attributable to a relaxation of the legal prerequisites to obtaining a divorce. In addition to the traditional fault-based factors by which a spouse may successfully obtain a divorce, *see* note 20 *supra*, a judicial determination that the marriage had irretrievably broken down became sufficient grounds for divorce in some states. *See* Freed & Foster, *Divorce in the Fifty States: An Overview as of August 1, 1979*, [1979] 5 FAM. L. REP. (BNA) 4027. With the advent of these "no-fault" divorce statutes, the criteria for divorce shifted to factors such as extended periods of separation and irreconcilable differences between the spouses. In many states, the individual conduct of one party has become irrelevant in awarding alimony and dividing property. *See* Note, *supra* note 17, at 133-34. *See, e.g.*, Green & Long, *The Real and Illusory Changes of the 1977 Marriage and Divorce Act*, 27 CATH. U.L. REV. 469 (1978) (1977 amendments to D.C. Code eliminated fault as gounds for absolute divorce).

29. The Supreme Court implicitly recognized changing familial roles in Stanley v. Illinois, 405 U.S. 645 (1972) (presumption that unwed mother, but not unwed father, had a right to custody after the death of one parent is invalid) and Roe v. Wade, 410 U.S. 113 (1973) (woman has a right to choose to have an abortion).

30. *See* Ginsburg, *Sex Equality and the Constitution*, 52 TUL. L. REV. 451 (1978).

31. Under the Court's formula of "strict scrutiny," race was identified as a suspect class which a state may treat differentially only to promote a compelling state interest. *See* Korematsu v. United States, 323 U.S. 214 (1944). Other classifications, such as wealth, need only be rationally related to a legitimate state interest in order to be held constitutionally valid. *See* San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 28-29 (1973). *See also* Ginsburg, *supra* note 30, at 468.

32. The Court had adopted an approach of "minimal scrutiny" in considering the relationship of sex-based classifications to state interests. Under this standard, a state could discriminate on the basis of sex if its classification was rationally related to a legitimate state interest. *See, e.g.*, Goesaert v. Cleary, 335 U.S. 464 (1948) (exclusion of women from tending bar not violative of equal protection); Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872) (exclusion of women from admission to the bar not violative of equal protection).

33. *See* Emden, *Intermediate Tier Analysis of Sex Discrimination Cases: Legal Perpetuation of Traditional Myths*, 43 ALB. L. REV. 73 (1978); Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. (1972); Johnston & Knapp, *supra* note 3; Comment, *Constitutional Law: Equal Protection — Gender Discrimination — Califano v. Goldfarb*, 23 N.Y.L.S.L. REV. 503 (1978); Comment, *Constitutional Law: Equal Protection Challenges to Gender-Based Classifications Evoke Varied Court Responses*, 17 WASHBURN L.J. (1977); Note, *Equal Protection: Modes of Analysis in the Burger Court*, 53 DEN. L.J. 687 (1976).

34. 404 U.S. 71 (1971).

Supreme Court for the first time required that a state have a substantial interest to protect in drawing its gender-based classification. In this case, an Idaho statute giving preference to men over equally qualified women in selecting administrators for decedents' estates was held to violate the equal protection clause.[35] The Court modified its "minimum rationality" standard to require further that any gender-based discrimination be reasonably related to the achievement of an important governmental objective.[36] The Court, therefore, rejected Idaho's contention that the administrative convenience of automatically selecting males as estate administrators was an important governmental interest justifying the use of sex classifications.[37]

Despite its willingness to grant women benefits on equal protection grounds, the Supreme Court hesitated to grant women affirmative duties and financial responsibilities. In *Kahn v. Shevin*,[38] for example, the Court upheld a paternalistic statute because it compensated women for economic hardships they had suffered as a disadvantaged class.[39] *Kahn* involved a Florida statute granting widows, but not widowers, a property tax exemption. By endorsing such benign discrimination, the Court apparently presumed that a widow could not assume her husband's duties and that she therefore needed preferential tax treatment.[40]

Congressional efforts to ease the presumed burdens of the working world on women have been consistent with the states' concerns in drafting paternalistic statutes. In the military, for example, Congress devised a policy for promoting naval officers that was more lenient for women than for men.[41] Under this unbalanced promotion policy, female naval officers were allowed four more years of service than male officers to achieve a

35. *Id.* at 76.

36. *Id.* at 75-76. A plurality of the Court carried this formula a step further in Frontiero v. Richardson, 411 U.S. 677 (1973), by applying the test of strict scrutiny to gender discrimination. While a majority of the Justices agreed that the sex-based benefit system in question was unconstitutional, only four of the Justices held sex to be a suspect class. *Id.* at 682-91. After *Frontiero*, a standard less rigorous than strict scrutiny evolved for gender discrimination. *See generally* Comment, *Gender-Based Discrimination and a Developing Standard of Equal Protection Analysis*, 46 U. CIN. L. REV. 572, 574-76 (1977).

37. 404 U.S. at 76. *See* Erickson, *Kahn, Ballard, and Wiesenfeld: A New Equal Protection Test in "Reverse" Sex Discrimination Cases?*, 42 BROOKLYN L. REV. 1 (1975).

38. 416 U.S. 351 (1974).

39. *Id.*

40. The Florida legislature also offered the exemption to the blind and disabled. *Id.* at 352 n.2.

41. Schlesinger v. Ballard, 419 U.S. 498 (1975).

minimum promotion level before being mandatorily discharged.[42] In reviewing this policy in *Schlesinger v. Ballard*,[43] the Supreme Court found that Congress had reasonably concluded that female officers in the Navy had less opportunity for promotion than male officers. Under this benign discrimination rationale, the Court considered the more lenient policy for women a fair remedial step toward bringing women to parity in employment and it held the discriminatory policy constitutionally sound.[44]

The Court again considered the validity of a congressionally mandated preferential policy based on sex in *Califano v. Webster*.[45] In that case, the plaintiff challenged a federal statute calculating social security benefits on the basis of sex. Under the statutory formula, women applying for social security retirement benefits computed their average wage, which formed the basis of the benefit-level computation, by eliminating eight of their low wage-earning years. Similarly situated men, however, were allowed to deduct only five low wage-earning years from their averages.[46] In upholding the preferential system, the Court recognized the reduction of the economic disparity between men and women as an important governmental objective.[47] Although the statute was found to discriminate on the basis of sex, the form of discrimination was considered benign because the legislative classification served to advance the economic position of women as a class historically recognized as underprivileged.[48] The Court thus implicitly acknowledged that the government may utilize gender-based classifications to cushion the financial difficulties that women might face on their own even though such classifications may reinforce sexual stereotypes.[49]

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42. *See* 10 U.S.C. §§ 6382, 6401(a) (1976).

43. 419 U.S. 498 (1975).

44. *Id.* at 508.

45. 430 U.S. 313 (1977).

46. *Id.*

47. 430 U.S. at 318. The formula for calculating Social Security benefits was based on the statistically accurate assumption that the average annual wage of women was lower than the average wage of men. *See* Note, *Social Security: Sex Discrimination and Equal Protection*, 30 BAYLOR L. REV. 199, 201 (1978). For statistics comparing the average wages of women with the average wages of men, see THE SUBTLE REVOLUTION: WOMEN AT WORK, *supra* note 27, at 31-36.

48. 430 U.S. at 317-18. *See generally* Note, *Fifth Amendment Protection Against Gender-Based Discrimination in the Distribution of Survivors' Benefits: Califano v. Goldfarb*, 31 SW. L.J. 1156 (1977).

49. *See* Erickson, *supra* note 37, at 18 (benign discrimination encourages people "to maintain the attitude that women are weaker or less able or should have different society roles than men").

B. Application of the Constitutional Analysis to Domestic Rights and Responsibilities

Lower courts considering domestic relations questions were, until recently, guided by the benign discrimination posture adopted by the Supreme Court in *Kahn, Ballard*, and *Webster*. Faced with constitutional challenges to alimony and child support statutes discriminating in favor of women, these courts reaffirmed the Supreme Court's view that women needed special protection from the economic burdens of maintaining a family because of their general inability to provide for financial support.[50]

In *Stern v. Stern*,[51] the Connecticut Supreme Court rejected a husband's claim that a state statute imposing the duty of alimony *pendente lite*[52] exclusively on men violated the equal protection clause. According to the court, the state legislature properly considered popular preconceptions concerning the distribution of duties between husband and wife in articulating its legislative purpose.[53] The court cited the equal protection standard established in *Reed v. Reed*[54] for the proposition that arbitrary sex-based discrimination is invalid. It held, however, that the sex-based discrimination of the Connecticut alimony law was not arbitrary because the legislature could "properly make judgments about family life" reflecting the traditional view that men, but not women, are responsible for spousal support.[55]

On similar facts, the Georgia Supreme Court, in *Murphy v. Murphy*,[56] relied heavily on *Kahn v. Shevin*[57] to uphold a divorce statute imposing an exclusively male alimony duty. The court analogized the difficulties women encounter at the death of their husbands to those confronted at divorce and held that divorcees need protection from the onus of paying alimony.[58] Implicit in the court's reasoning was the assumption that it is generally the exwife who is the spouse more in need of financial support upon divorce. Thus, according to that court, a state policy exempting divorced women from the duty to pay alimony was a reasonable means to

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50. *But see* Doyle v. Doyle, 5 Misc. 2d 4, 158 N.Y.S.2d 909, 912 (Sup. Ct. 1957) ("Why should ex-wives and separated women seek a preferred status in which they shall toil not, neither shall they spin.[*sic*]").

51. 165 Conn. 190, 332 A.2d 78 (1973).

52. Alimony *pendente lite* is temporary alimony, generally awarded while the divorce proceedings are pending. It may be awarded to a dependent spouse to cover general needs or court costs and attorney's fees. *See* Kurtz, *supra* note 24, at 131-32.

53. 165 Conn. 190, 332 A.2d 78, 82 (1973).

54. 404 U.S. 71 (1971). *See* notes 34-37 and accompanying text *supra*.

55. 165 Conn. at 198, 332 A.2d at 82.

56. 232 Ga. 352, 206 S.E.2d 458 (1974), *cert. denied*, 421 U.S. 929 (1976).

57. 416 U.S. 351 (1974). *See* notes 38-40 and accompanying text *supra*.

58. 232 Ga. at 353, 206 S.E.2d at 459.

alleviate the burdens that women face upon separation from their husbands.

Courts have upheld similar sex-based child support laws for the same reasons they advanced to justify alimony awards. In *Dill v. Dill*,[59] for example, the Georgia Supreme Court upheld a statute making fathers primarily liable for their children's support. The statute required mothers to provide support only upon the death, desertion, or incapacity of the father.[60] Wanlyn Dill had sought enforcement of a support decree against her former husband through the Uniform Reciprocal Enforcement of Support Act[61] which had been adopted in part by that state's legislature. Her husband, however, argued that the portion of the Act making men primarily liable for child support was a violation of the equal protection clause. In a brief opinion, the court dismissed the father's claims, citing the natural, physical, social, and economic differences between the sexes as justification for the differential treatment.[62] The Colorado Supreme Court upheld a similar sex-based system of parental rights and responsibilities in *People v. Elliott*.[63] The court examined a Colorado statute under the federal equal protection clause and concluded that the allocation of child support obligation solely to the male parent reflected a reasonable and accurate conclusion that men, because of their social and economic status, were in a better position to provide support for their children.[64]

Both the child support and earlier alimony decisions reflect a presumption which may in many cases be accurate: women are less able than men to provide financial support for their families. These sex-based policies may have been designed to allocate financial support to the spouse most in need and to remedy the effects of past discrimination. The benign purposes of these policies are losing validity, however, as principles of sexual equality are slowly being translated into greater economic independence for women.[65] To the extent that these policies do not change to reflect the

59. 232 Ga. 231, 206 S.E.2d 6 (1974).

60. *Id.* at 231-32, 206 S.E.2d at 7.

61. Portions of the Uniform Reciprocal Enforcement of Support Act relating to enforcement of out-of-state support decrees have been incorporated into the Code of Georgia. GA. CODE ANN. § 99-903a(6[a-b]) (1976).

62. 232 Ga. at 233, 206 S.E.2d at 7.

63. 186 Colo. 65, 525 P.2d 457 (1974).

64. *Id.* at 71, 525 P.2d at 457. The Colorado statute has since been amended to equalize child support responsibilities between both parents. *Id.* at 69, 525 P.2d at 459. *See also* Gomez v. Perez, 409 U.S. 535 (1973) (fathers have sole obligation for support of their children whether legitimate or illegitimate); Wright v. Standard Oil Co., 319 F. Supp. 1364 (N.D. Miss. 1970) (since father is primarily liable for child support, he alone has right of action to recover losses for injuries inflicted on child).

65. One commentator believes that the financial responsibility that family support stat-

changing economic status of women, they will perpetuate the stereotypic notion of women as the dependent sex. Additionally, since a woman's financial needs and capabilities can be individually determined in a judicial hearing, generalizations enforced by the above cases seem increasingly unfair.[66]

II. RECENT DEVELOPMENTS: *COLEMAN*, *PFOHL* AND *ORR*

Some courts have begun to recognize the inadequacies of sexual stereotypes as relevant factors in determining familial responsibilities.[67] State equal rights amendments[68] (ERA's) provide a convenient framework for such courts to overturn sex-based classifications in family law. In *Coleman v. Maryland*,[69] for example, the Maryland Court of Special Appeals interpreted the state ERA as a bar to sex distinctions in assessing spousal support.[70] The court reversed the conviction of Lewis Coleman for desertion and nonsupport of his wife. The reversal was based on a finding that Maryland's desertion and nonsupport statute, which was applicable only to husbands, was unconstitutional under the state's ERA. According to the court, Maryland's ERA accurately reflects changing attitudes about family life in contrast to the traditional male-only support statutes reflecting the nineteenth-century notion that only husbands should pay support.[71]

Although only seventeen states are armed with ERA's to strike down sex-based support and alimony statutes,[72] over forty states have divorce

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utes place on men is a major source of male authority and power. Continually placing these responsibilities on men, therefore, precludes women from expanding their authority and power and, in fact, reinforces their domesticity and dependency. *See* Weitzman, *supra* note 13, at 1182, 1197.

66. *See* Kurtz, *supra* note 24, at 133.

67. *See, e.g.*, Orr v. Orr, 440 U.S. 268 (1979); Pfohl v. Pfohl, 345 So. 2d 371 (Fla. 1977); Plant v. Plant, 20 Ill. App. 3d 5, 312 N.E.2d 847 (1974).

68. As of 1979, 17 states had enacted Equal Rights Amendments to their state constitutions barring discrimination on the basis of sex. ALASKA CONST. art. I, § 3; COLO. CONST. art. II, § 29; CONN. CONST. art. I, § 20; HAWAII CONST. art. I, §§ 4, 21; ILL. CONST. art. I, § 18; LA. CONST. art. I, § 3; MD. CONST. DECLARATION OF RIGHTS art. 46; MASS. CONST. DECLARATION OF RIGHTS art. I; MONT. CONST. art. II, § 4; N.H. CONST. pt. I, art. 2; N.M. CONST. art. II, § 18; PA. CONST. art. I, § 28; TEX. CONST. art I, § 3a; UTAH CONST. art IV, § 1; VA. CONST. art. I, § 11; WASH. CONST. art. XXXI, § 1; WYO. CONST. art. I, § 3. *See* Kurtz, *supra* note 24, at 101-02.

69. 37 Md. App. 322, 377 A.2d 553 (1977).

70. *See also* Rand v. Rand, 280 Md. 508, 374 A.2d 900 (1977) (sex-based child support statute invalidated on the basis of Maryland ERA); Henderson v. Henderson, 458 Pa. 97, 327 A.2d 60 (1974) (security deposit requirement applicable to men only invalidated on the basis of Pennsylvania ERA statute).

71. 37 Md. App. at 326, 377 A.2d at 556.

72. *See* Kurtz, *supra* note 24, at 101.

statutes specifically allowing alimony to be awarded to either party.[73] These sex-neutral statutes are as effective as the state ERA's in equalizing the treatment of husbands and wives with regard to alimony. The Florida state legislature, for example, specifically amended its divorce statute to allow an alimony award to either party.[74] In *Pfohl v. Pfohl*,[75] the District Court of Appeals of Florida applied the state statute to require that the wife pay both lump sum and rehabilitative alimony to her husband. In *Pfohl* the husband, formerly a toy salesman, had stopped working at the request of his wife, whose personal accumulated wealth was over four million dollars. The court noted that the statute "is in keeping with the current social trend toward establishing a more equitable relationship between the sexes,"[76] and that the standards previously used to determine how much alimony the wife should receive would now apply equally to husbands seeking alimony.[77]

Coleman, Pfohl, and similar cases left unanswered the question of whether sex-based support provisions are permissible in the absence of a state ERA or other sex-neutral statute; that is, whether a sex-based support statute can withstand equal protection scrutiny. In *Orr v. Orr*[78] the Supreme Court decided the question in the negative. The plaintiff had instituted contempt proceedings against her former husband, alleging his failure to make alimony payments. Her husband asserted that the Alabama statute requiring husbands but not wives to pay alimony was unconstitutional under the fourteenth amendment.[79] The Alabama Court of Civil Appeals affirmed the lower court's decision upholding the statute.[80] Relying on *Murphy v. Murphy*,[81] the court concluded that the state legisla-

73. *See* ECONOMICS OF DIVORCE, *supra* note 28; Freed & Foster, *supra* note 28, at 4033. The state statutes still allowing alimony to women only are: IDAHO CODE §§ 32-704, 32-706 (1947); N.Y. DOM. REL. LAW art. 13, § 236 (1964); WYO. STAT. § 20-2-114 (1977). *But see* Thaler v. Thaler, 89 Misc. 2d 315, 391 N.Y.S.2d 331 (Sup. Ct. 1977) (New York's female-only alimony statute violates the equal protection clause; court has power to award alimony to men as well).

74. *See* FLA. STAT. § 61.08 (1975). *See also* Cypen, Irving & Stephen, *Alimony for Husbands: Is There True Equality?*, 52 FLA. BAR J. 201 (1978).

75. 345 So. 2d 371 (Fla. Dist. Ct. App. 1977).

76. *Id.* at 376.

77. *Id.*

78. 440 U.S. 268 (1979).

79. Because husband William Orr had not requested alimony for himself, a question of his standing to sue arose. According to the dissent, the justiciability issue relieved the Court from considering the substantive constitutional question. 440 U.S. at 290-300 (Rehnquist, J., dissenting).

80. 351 So. 2d 904 (Ala. Civ. App. 1977), *rev'd*, 440 U.S. 268 (1979).

81. 232 Ga. 352, 206 S.E.2d 458 (1974), *cert. denied*, 421 U.S. 929 (1975). *See* text accompanying notes 56-58 *supra*.

ture could reasonably decide that the female partner of a broken marriage needs the financial assistance that the alimony exemption provides.[82] The Alabama Supreme Court denied certiorari although a strong dissent criticized the protectionist alimony statute as perpetuating, rather than alleviating, discriminatory practices.[83]

On appeal to the United States Supreme Court, the Alabama decision was reversed. Speaking for the majority, Justice Brennan reiterated the equal protection standard for gender-based discrimination.[84] The Court emphasized that any protectionist practice must actually further the legislature's articulated goal of bringing needy women to parity.[85] The Alabama statute, however, did not accomplish this purpose since it applied to both wealthy and needy women. The Court rejected the argument that exempting women from the obligation of alimony indicated "the State's preference for an allocation of family responsibilities under which the wife plays a dependent role."[86] The Court thus reaffirmed its earlier standard enunciated in *Reed* that promotion of a male-dominated family is not a legitimate state goal justifying use of a sex-based classification.[87]

III. The Newly Emerging Responsibilities of Wives and Mothers

The recent judicial tendency to eliminate sex as a factor in determining which party should provide support for the family is justifiable in light of the availability of individualized hearings at which each party's needs and abilities can be ascertained.[88] In *Kahn*, there was no method readily available to determine an individual widow's need for the property tax exemp-

82. 351 So. 2d at 905.

83. Justice Jones, criticizing the sex-based alimony statute, considered unfounded the generalization that all women are economically disadvantaged after divorce. He further noted that the statute "perpetuates the misguided conception that women are not legally equal to men." *Id.* at 906, 909 (Jones, J., dissenting).

84. 440 U.S. 268, 279 (1979).

85. *Id.* at 280-81. The Court's reasoning follows the test set forth in Califano v. Goldfarb, 430 U.S. 199 (1977), and Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), that a statute intended to remedy the economic disadvantages historically experienced by women must actually further that objective before it can withstand constitutional scrutiny. *See* Erickson, *supra* note 37, at 36. By this standard, attempts to achieve state interests through gender-based classifications will be subjected to "a careful analysis of whether the means used substantially relate to achieving the desired objective." Comment, *supra* note 36, at 578.

86. 440 U.S. 1 at 279.

87. *See* notes 34-37 and accompanying text *supra*.

88. *See* Cypen, Irving & Stephen, *supra* note 74, at 203; Comment, *Child Support: His, Her, or Their Responsibility?*, 25 DePaul L. Rev. 707 (1976); Note, *The Implied Partnership: Equitable Alternative to Contemporary Methods of Postmarital Property Distribution*, 26 U. Fla. L. Rev. 221 (1974).

tion. Thus, wealthy widows received the special tax treatment along with financially dependent widows who were the intended beneficiaries of the remedial legislation.[89] When alimony and child support are at issue, however, property settlement proceedings and child support hearings can readily determine the need for relief on a case-by-case basis.[90] Thus, alimony and child support proceedings offer a setting for the full development of a sex-neutral approach to the imposition of familial responsibilities.

Justice Brennan stressed the importance of these individualized determinations in *Orr*. He pointed out that because courts provide hearings at which the parties' comparative financial needs and abilities are considered, there is no need for courts to assume that all wives are financially dependent and all husbands are not.[91] The Supreme Court in *Orr* refused to apply the *Kahn* generalizations about wage-earning and support ability to alimony. The Court suggested that, if a state wishes to assist financially needy spouses, it may not predetermine a spouse's need by imposing sex-based classifications.[92] Thus, after *Orr*, it is clear that the sex-neutral equal protection standard requires the responsibility for spousal support to be assessed on some basis other than sex.[93]

State constitutional amendments have also been instrumental in promoting need as a basis for alimony and spousal support determinations. The *Coleman* court, for example, used the sex-neutral approach of the state's ERA in invalidating Maryland's sex-based nonsupport statute. The court explained that, due to changing social conditions, courts "may no longer arbitrarily assign roles and obligations upon the basis of gender."[94] While the conviction in *Coleman* was in violation of the sex-based desertion and nonsupport statute, it is significant that the Maryland divorce statute allowed alimony awards on the basis of need and not on the basis of sex.[95] The divorce statute thus conformed to the provisions of the ERA while the criminal nonsupport statute did not. The *Coleman* court eliminated this inconsistency[96] by requiring a sex-neutral approach in the sup-

89. *See* Kurtz, *supra* note 24, at 133.
90. *Id.*
91. 440 U.S. at 281-82.
92. *Id.* at 281.
93. *Id.* at 280.
94. 37 Md. App. at 325, 377 A.2d at 554.
95. The statute assigned the responsibility for alimony and spousal support on the basis of financial need by specifying that, in order to receive alimony, it must appear from the evidence that the "spouse's income is insufficient to care for his or her needs." MD. CODE ANN. art. 16, § 5 (1976).
96. It was not logical that women who would be charged with the support responsibility under the divorce statute could not be penalized for failure to carry out that responsibility while men could be. *See* 37 Md. App. at 328-29, 377 A.2d at 554.

port statute and by implicitly endorsing a case-by-case determination of liability.

The Florida court's reasoning in *Pfohl* also embraced an individualized approach to determine the relative financial circumstances of both partners and to allocate the responsibility for spousal support after marriage. After examining the financial needs and capabilities of both spouses, the court accepted the lower court's determination that the wife was the sole provider of the couple's lavish lifestyle.[97] The court also accepted the finding that the husband needed temporary rehabilitative assistance in regaining employment because, at the insistence of his wife, he had not worked for over seven years during the marriage. The husband had suffered from a mental disorder which, according to expert testimony, would require at least a year of intensive psychotherapy.[98] His physical good health and previous work experience[99] were, however, evidence that his incapacity was only temporary and did not justify a permanent award. In harmony with *Orr*, the gender of the parties was not a factor determining the parties' financial needs and abilities.[100]

The equitable distribution of responsibilities undertaken in *Pfohl, Coleman* and *Orr* may encourage courts to award temporary support more frequently for a spouse who has the ability to recover from the extended loss of employment during marriage.[101] After closely examining the facts of each case, courts may be more likely to award rehabilitative alimony because, under the equitable principles underlying *Orr*, they must recognize that the husband's duty to his wife and children is neither exclusive nor necessarily permanent. An approach of awarding rehabilitative alimony[102] to either the male or female spouse would temporarily alleviate the difficulties of a sudden separation while not imposing a lifelong duty on either spouse.[103] Obviously, however, a court need not resort to such a measure when a woman who has devoted a considerable portion of her

97. Pfohl v. Pfohl, 345 So. 2d 370, 376 (Fla. Dist. Ct. App. 1977).

98. *Id.* at 376-77.

99. *Id.* at 378.

100. For a critical comparison of rehabilitative alimony and lump sum awards to wives and to husbands, see Cypen, Irving & Stephen, *supra* note 74, at 203.

101. *See The Course of Change in Family Law 1978-79*, [1979] 5 FAM. L. REP. (BNA) 4013, 4014.

102. Ideally, the rehabilitative alimony award would last "only for the period of time necessary for the wife to adjust to her new status and circumstances." Erickson, *Spousal Support Toward the Realization of Educational Goals: How The Law Can Ensure Reciprocity*, 1978 WIS. L. REV. 947, 951.

103. *See, e.g.*, Dakin v. Dakin, 62 Wash. 2d 687, 384 P.2d 639, 642 (1963) (award of temporary alimony to wife based on state's policy to place a duty upon wife to seek employment within a reasonable time after divorce).

working years to being a wife and mother has no realistic possibility of becoming financially independent.[104] An individual determination of needs and abilities may reveal that the wife is able to provide for herself or that she has training or a skill that may be revitalized. Through the detailed analysis of the particular facts of each case, as mandated by *Orr*, courts may realize that the historic need to protect all wives from the economic consequences of divorce no longer rests on accurate assumptions.[105]

The Court's reasoning in *Orr* may in the future be extended to invalidate sex-based child support statutes. While there has already been some movement by state courts toward equalizing child support responsibilities,[106] most states still impose the primary duty for child support on fathers.[107] Since judicial hearings are routinely held to determine the amount and conditions for child support and child custody, there is already a mechanism for ascertaining which parent is better able to meet the children's financial needs upon divorce. For this reason, no important state interest is served by making men primarily or solely responsible for the economic welfare of their children on the assumption that women need special protection because they are unprepared to meet their share of the financial obligations.[108] Moreover, under the equal protection standard that has evolved since *Reed v. Reed*, the administrative convenience of automatically making fathers responsible for support is not a governmental interest sufficiently important to justify sex-based discrimination.[109] Nor, as *Orr* confirmed, is promotion of a male-dominated family structure a sufficiently important governmental objective.[110] If a state's intention to

104. *See* Erickson, *supra* note 37, at 49-50.

105. *See generally* Erickson, *supra* note 102; Note, *supra* note 17.

106. For example, in Plant v. Plant, 20 Ill. App. 3d 5, 312 N.E.2d 847 (1974), the Appellate Court of Illinois refused to award retroactive support to a mother for expenditures she made on behalf of her 17-year-old daughter. The court, rejecting the mother's contention that the father is always primarily liable to provide child support, found that the obligation was joint and several and stated that actual determination of support should be made on the basis of the child's needs and the parents' respective income abilities. 312 N.E.2d at 849. *See also* Spaulding v. Spaulding, 204 N.W.2d 634 (Iowa 1973) (both parents are liable for child support in proportion to their ability to pay); Pennsylvania v. Baggs, 392 A.2d 720 (Pa. Super. Ct. 1978) (statute imposing penalty for willful neglect or refusal to support illegitimate child applies to both parents).

107. *See* Freed & Foster, *supra* note 28, at 4034; Kurtz, *supra* note 24, at 145.

108. *See* Califano v. Webster, 430 U.S. 313 (1977). *See also* text accompanying notes 45-49. In *Webster*, equalization of the financial positions of men and women and compensation of women for past discrimination and economic disadvantages was an "important governmental objective." *See also* Weiner, *Child Support: The Double Standard*, 6 FLA. ST. L. REV. 1317, 1335-39 (1978); Note *supra* note 47, at 205.

109. *See* notes 34-37 and accompanying text *supra*.

110. 440 U.S. at 268, 279-80.

eliminate the effects of past sex discrimination is genuine, it could accomplish this goal by implementing a scheme of child support that would assess each parent's financial abilities without relying on a sex-based generalization. Thus, the sex-based classification used in most child support statutes should be held invalid because it unnecessarily "carries with it the baggage of sexual stereotypes."[111]

Similar to awards of child support, determinations of child custody have long been based on sex-based presumptions rather than equitable considerations. Originally, the custodial responsibility rested with the father because his children were regarded as his chattels.[112] In twentieth-century American law, however, child custody has been an almost exclusively female duty.[113] In general, courts endeavor to promote the "best interests" of children of divorce[114] by placing them with the parent better able to care for them. Courts presume, however, that mothers are inherently better parents than fathers and that, all things being equal, the mother should be awarded custody.[115] Courts have most frequently invoked this maternal preference rule when children of "tender years"[116] have been the subject of custodial disputes.

The changing familial roles which significantly shaped judicial approaches to marital and child support[117] have also encouraged revision of the sex-based maternal preference rule in child custody. Many states have specifically discarded the tender-years doctrine, and several have statutorily equalized child custody laws regardless of the child's age.[118] Sex-based criteria for determining child custody have been successfully attacked under state ERA's[119] and, in New York, have been held unconstitu-

111. *Id.* at 283.

112. *See* M. ROMAN & W. HADDAD, THE DISPOSABLE PARENT 25 (1978); Kurtz, *supra* note 24, at 136; Orthner & Lewis, *Evidence of Single-Father Competence in Childrearing*, 13 FAM. L.Q. 27 (1979).

113. In approximately 90% of contested custody cases, mothers are awarded custody of their children. M. ROMAN & W. HADDAD, *supra* note 112, at 23.

114. *See* Kurtz, *supra* note 24, at 138; Comment, *The Father's Right to Child Custody in Interparental Disputes*, 49 TUL. L. REV. 189 (1974).

115. *See* Note, *Maternal Preference and the Double Burden: Best Interest of Whom?*, 38 LA. L. REV. 1096 (1978).

116. *See, e.g.*, Jenkins v. Jenkins, 173 Wis. 592, 181 N.W. 826 (1921). *See also* Freed & Foster, *Life With Father*, 11 FAM. L.Q. 321, 329-40 (1978).

117. *See* notes 27-29 *supra*.

118. Thirty states have rejected the tender years doctrine while 10 states have statutorily "de-sexed" child custody. Freed & Foster, *supra* note 28, at 4035-36.

119. *See, e.g.*, King v. Vancil, 34 Ill. App. 3d 831, 341 N.E.2d 65 (1975); Pennsylvania *ex rel.* Spriggs v. Carson, 470 Pa. 290, 368 A.2d 635 (1977). *But see* Arends v. Arends, 30 Utah 2d 328, 517 P.2d 1019 (1974).

tional on equal protection grounds.[120] In jurisdictions still adhering to gender-based presumptions, *Orr* is likely to be a catalyst for change.[121]

Similar to the historical presumption that men are better able financially to support their families, the presumption that women are better able to rear children is a conclusion based on stereotypic generalizations.[122] Under the equal protection analysis of *Orr*, such generalizations cannot withstand constitutional scrutiny because no legitimate state interest justifies the sex-based distinction. The maternal preference rule was justified on the grounds that caring for children was properly the domain of women. As men increasingly assume more responsibility for the care of their children, this rationale is less frequently valid.

Of the possible state interests which might justify the maternal preference rule, compensating women for the effects of past discrimination is not applicable. Awarding custody to mothers does not effectively lessen the burdens that divorced or separated women face.[123] The rule is also inconsistent with the standard of equal protection presently applied to sex-based classifications since, after *Reed v. Reed*,[124] it is unlikely that the administrative convenience of automatically awarding women child custody in contested cases would be found to be a sufficiently important state interest justifying a sex-based classification. Finally, the support and custody proceedings provide the opportunity to analyze each party's child-rearing qualifications and to devise an appropriate custodial arrangement in the best interests of the child.[125]

In the aftermath of *Orr*, the responsibility for alimony and child support is shifting from an exclusively male duty to a shared obligation. Hopefully, the courts will be influenced by *Orr* in custody cases and will replace the maternal preference rule with a more individualized determination.

120. In New York *ex rel.* Watts v. Watts, 77 Misc. 2d 178, 350 N.Y.S.2d 285 (Fam. Ct. 1973), the court used a standard of strict scrutiny to invalidate the tender years presumption, noting that it is "actually a blanket judicial finding of fact . . . that, until proven otherwise by the weight of substantial evidence, mothers are always better suited to care for young children than fathers." *Id.* at 287.

121. *See* Freed & Foster, *supra* note 28, at 4035-36.

122. *See* New York *ex rel.* Watts v. Watts, 77 Misc. 2d 178, 350 N.Y.S.2d 285, 289 (Fam. Ct. 1973). *See also* Orthner & Lewis, *supra* note 112, at 27.

123. Though the custodial parent is not charged with a separate financial support obligation, divorced mothers are today likely to work outside the home while assuming their custodial duties. *See* M. ROMAN & W. HADDAD, *supra* note 112; THE SUBTLE REVOLUTION, *supra* note 27, at 9, 11. *See also* Erickson, *supra* note 37, at 46; Comment, *supra* note 114, at 199; Note, *supra* note 115, at 1099.

124. 404 U.S. 71 (1971).

125. For a discussion of the arguments in favor of joint custody, see M. ROMAN & W. HADDAD, *supra* note 112.

Under the equitable principles of *Orr*, the emphasis in determining familial duties should now be on the individual rather than the class.

IV. CONCLUSION

The insulation of women from the rights and responsibilities granted to men has shielded wives and mothers from the duty of providing financial support to their husbands and children. By applying the fourteenth amendment's equal protection clause to strike down sex-based discrimination, courts have recognized women as equals for the purposes of receiving benefits previously granted only to men. Recently, women have also been recognized by courts as equals for the purposes of assuming responsibilities previously imposed only on men. This trend responds to the growing financial capabilities of women and heralds the beginning of a genuinely equitable approach to alimony, child support, and child custody determinations. The new approach to assessing familial responsibilities requires that women be treated individually in their roles as spouses and as parents: the actual needs and abilities of the parties, instead of their gender, should be determinative factors. Given the capabilities of the family courts to weigh these considerations, this individualized approach is a just and effective method of accommodating the new roles and abilities of women. Under such an approach, outmoded assumptions hopefully will be replaced by equitable assessments of rights and responsibilities for men and women alike.

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